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AUTHOR McKay, Robert B.

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ABSTRACT

The facts and principal issues of the Bakke case, some of the strengths of the U. S. Supreme Court judgment, and some of the questions left for later resolution are considered. Bakke alleged violation of equal protection provisions, since he was denied admission to the University of California (Davis) medical school, although his test scores and grade point average were higher than most or all the 16 minority applicants who were accepted under a Task Force Program. After a trial court and California Supreme Court issued opinions, the U.S. Supreme Court heard the case. The prevailing view on principal issues was that race and ethnic background may be considered along with other factors in higher education admissions decisions, and that Bakke must be admitted to the medical school at Davis because the procedures pursuant to which he was denied admission were invalid. It is suggested that the central message of the decision is an approval of affirmative action, and that the Davis program was rejected, not because race and ethnicity were taken into account in making admissions decisions, but because of the two-track character of the program. The six opinions of the Supreme Court Justices are outlined. It is suggested that the most important proposition of the decision is that the Court has now resolved the doubts that have revolved around all race-conscious admissions programs. Every college and university, after determining that its admissions program complies with the Court's guidelines, will now be able openly to state what it intends. The Court also left leeway to medical schools and higher education in prescribing admission standards. Unresolved issues include: the extent to which numbers of minority students should be considered in the admissions program, permissible admissions criteria, and the impact of the Bakke decision on financial aid and other programs intended to aid minority students. (SW)

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THE DECISION AND ITS BACKGROUND

Robert B. McKay

Director, Program on Justice, Society and the Individual
Aspen Institute for Humanistic Studies

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BAKKE AND BEYOND

The Decision and Its Background

Robert B. McKay*

When the Education Commission of the States and the Justice Program of the Aspen Institute inquired in April of this year into the potential impact on higher education of the various possible decisions the Supreme Court might reach in the Bakke case, I suggested that this is "the case with everything, or at least something for everyone."

That was two months before the decision. Now that we have had time to reflect on the decision itself, I reassert that opinion even more strongly. On June 28, 1978, the world was treated to a judgment with two major holdings, several minor conclusions, and six separate opinions. (Only Chief Justice Burger and Justices Rehnquist and Stewart chose not to add to the confusion, having silently joined in the supremely technical position advanced by Mr. Justice Stevens.)

The "something for everyone" aspect was not diminished by the fact that all participants in the proceeding could claim something of a victory.

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*Director, Program on Justice, Society and the Individual of the Aspen Institute for Humanistic Studies.

Allan Bakke was certainly a winner. He got the only thing he ever asked for - an order admitting him to the University of California Medical School at Davis, where presumably he sits in class right now. But many of his principal supporters may have been less pleased with the other half of the holding, that race and ethnicity can be taken into account in higher education admissions, which I believe to be the major outcome of the case.

Although I am already ahead of my story, which deserves an orderly recounting of facts, issues and holdings, I hope you will allow me to delay a bit longer that proper unfolding while I report some of my own biases to help you judge the account which follows.

You should understand my own deep commitment to affirmative action in higher education. As a law school dean between the mid-1960s and the mid-1970s I vigorously encouraged efforts to recruit and admit minority students to a law school which had gone almost all white in the course of our rather strict adherence to admission standards that were useful - in a period then and now of 10 to 15 applicants for every place - because based on so-called objective factors such as grade point average (GPA) and Law School Admission Test scores (LSAT). Moreover, I was the first chairman of the Association of American Law Schools (AALS) Committee on Minorities. So, when Bakke came along it was natural that I should be one of the signers of the brief of the AALS.

By the spring of 1978 I had persuaded myself that the Davis program was not only valid - however far to one end of the spectrum - but that the Supreme Court might well uphold it. As a matter of fact, I was not far off base, since

four agreed with that view, while four held the Davis program invalid only on statutory grounds without passing on the constitutional question. Only Mr. Justice Powell concluded that the Davis program was unconstitutional.

Against that background you may be surprised to hear that I consider the Supreme Court decision in Bakke to be a considerable victory, although not all academics agree. For example, during a panel on Bakke at the American Bar Association meeting in New York City in August a fellow panelist was Dean Louis Pollak of the University of Pennsylvania Law School, who was a major contributor to the brief in support of Davis on behalf of four universities, Harvard, Pennsylvania, Stanford and Yale. By the date of the panel in early August he had been confirmed as a United States District Court Judge for the Eastern District of Pennsylvania. Although he was not to be sworn in until September, Dean/Judge Pollak took advantage of his soon-to-be-assumed judicial mantle to convict me of optimism because of my analysis of the decision. Since I have found nothing in the statute books about the penalty for optimism, I have written Judge Pollak to ask about applicable procedures. Perhaps he will sentence me to write 1000 times on the blackboard my reasons for optimism. It is in that spirit that I offer my views on Bakke.

My other experience, arising out of the same panel, came in a letter from a member of the audience, another academic. After friendly acknowledgment of my presumed commitment to affirmative action, he chided me for having gone over to the enemy. The reference was to my remark during the panel discussion that the decision knocking out the Davis program made it possible for those of

us who supported affirmative action generally and the Davis program specifically to join forces with those who opposed the Davis program but supported affirmative action by other means. I believe my well meaning critic was wrong, and my principal purpose today will be to try to persuade you that it is now possible to forge a broad-based cooperative effort in behalf of recruitment and admission of minority applicants to institutions of higher education. I hope that does not sound too Panglossian for your taste. While it may not be the best of all possible worlds, I think it can be made to work very well.

The Facts. And so at last I come to my assigned task. Who was Allan Bakke, and what momentous constitutional issues were triggered by the decision to reject his application to the Davis Medical School?

Allan Bakke received a degree in mechanical engineering from the University of Minnesota in 1962. After graduate study there and service in the United States Marine Corps, he completed a master's degree in mechanical engineering at Stanford University in 1970. By 1972 he had completed the prerequisites for medical school.

In 1972 Allan Bakke applied for admission to two medical schools and was rejected by both. In 1973 he applied to, and was rejected by, 11 medical schools. In 1974 Davis turned down his second application to that school despite the fact that his premedical school grade point average and his Medical College Admission Test (MCAT) scores were higher than most or all the 16 minority applicants who were accepted.

The Davis Program for medical school admissions operated on two levels. In a class of 100 the general admissions program made decisions for 84 places, based on a complex formula of GPA, MCAT, interviews and even some preferences, based on geography or other special factors. Although race and ethnic background were not taken into consideration, several minority students were admitted in 1974 as part of the general admissions program.

The Task Force Program, separately administered, was ostensibly a program to select 16 "disadvantaged" applicants. In practice, the places were almost invariably awarded to applicants of a minority race or specified ethnic background.

When Allan Bakke was denied admission to Davis in 1974, he sued in the California state courts, alleging violation of the equal protection clause of the 14th amendment to the United States Constitution, a similar provision in the California Constitution and Title VI of the Civil Rights Act of 1964, which bars discrimination on grounds of race, color or national origin in federally assisted programs.

The trial court upheld Bakke's claim on all the grounds he had urged, but conditioned his admission on proof that he would have been admitted if there had been no Task Force Program. The Supreme Court of California also held the Davis program invalid as a violation of the United States Constitution, but without reference to the state constitution or federal statute. Significantly, it shifted the burden of proof on the admissions decision from Bakke to the university, ordering his admission unless the university could establish that he would not have been admitted if there had been no Task Force Program.

When the university conceded that it could not meet that challenge, the California Supreme Court ordered Allan Bakke admitted. That order was stayed by the Supreme Court of the United States when it agreed to review the case in a brief order in February 1977. After the case had been argued in October 1977, the Court asked for additional briefs on the applicability of Title VI of the Civil Rights Act to the case.

Meanwhile, the case has attracted the highest level of interest of any Supreme Court case in recent years. More than 50 briefs amici curiae were filed by early June 1977. Additional briefs were filed when the United States subsequently entered the case in qualified support of the university. The United States brief argued that it is permissible for a university to adopt a "minority-sensitive" program, but that the record in this case was not sufficient to establish whether the Davis program met the recommended test or transgressed the permissible. Accordingly, the brief asked the Court to remand the case to the California courts for further fact-finding.

The Decision. When Justice Lewis Powell announced the judgment of the Court in Bakke, it is almost accurate to say that he spoke as a majority of one, for he alone held the prevailing view on both principal issues:

First. Race and ethnic background may be considered along with other factors in higher education admissions decisions. In this he was joined by Justices Brennan, White, Marshall and Blackmun (in an opinion by Justice Brennan), reversing the California Supreme Court on the point.

Second. Allan Bakke must be admitted to the medical school of the University of California (Davis) because the procedures pursuant to which he was denied admission are invalid. In this, Justice Powell was joined by Chief Justice Burger and Justices Stewart, Rehnquist and Stevens (in an opinion by Justice Stevens). On this point the judgment of the California Supreme Court was affirmed. In the oral presentation from the bench, Justice Powell, who was fully aware of the ambiguities of the situation, said: "I will now try to explain how we divided on this issue. It may not be self-evident."

Because the Supreme Court of the United States affirmed in part and reversed in part the judgment of the California Supreme Court, the not uncommon initial reaction was to describe the judgment as "Solomonic" or "a historic compromise."

Careful review of the opinions of Justice Powell and the five others who concurred and dissented or wrote separate opinions suggests that the final result is not a compromise judgment; the educational baby is not threatened by a Solomonic sword. The central message was indeed an approval of affirmative action. The Davis program was rejected, not because race and ethnicity were taken into account in making admissions decisions, but because of the two-track character of the program. Sixteen seats in the entering class of 100 were reserved for blacks, Chicanos, Orientals and Native Americans; no others were eligible to compete for those places.

The Powell prose was cool and the language was measured, particularly when compared with the opinion for the Brennan group, or with the even stronger

language of Mr. Justice Marshall and of Mr. Justice Blackmun. Mr. Justice Brennan, for example, said:

> Government must take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

Mr. Justice Marshall, reviewing the history of racism in the United States, recalled that

> during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a state acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

The Marshall opinion, for all its passion, is oddly incomplete. There is no reference to any racial or ethnic group except blacks. Probably he meant to include others in his sweeping condemnation of racism. But the emphasis on slavery and specific mistreatment of blacks does not quite fit.

Probably the most eloquent, certainly the most widely quoted, is the statement of Mr. Justice Blackmun.

> In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must first treat them differently. We cannot - we dare not - let the Equal Protection Clause perpetrate racial supremacy.

Rhetoric, however, does not always carry the day. It is necessary, therefore to return to the cautious argument of Mr. Justice Powell as he carefully threaded his way between the two blocks of four, who disagreed with each other in crucial respects, but with each of whom Powell was able somehow to

find common ground. His task was to find reasons to disapprove of the Davis Program without striking down all race-sensitive admissions, and thus by implication all affirmative action programs.

The first step was to conclude that the use of race is a suspect classification, which can be justified only by showing that the state's purpose "is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its interest." Presumably, all members of the Court agree with that proposition, but the Brennan group differ on the permissible purposes, and the Stevens group do not reach the issue because of their narrow statutory perspective.

Justice Powell noted that the University of California supported the special admissions program on four bases: (1) "reducing the historic deficit of traditionally disfavored minorities in medical schools and the medical profession"; (2) countering the effects of societal discrimination; (3) increasing the number of physicians who will practice in communities currently underserved; and (4) obtaining the educational benefits that flow from an ethnically diverse student body.

The first three he rejected as insufficient to justify a minority-sensitive admissions program because to prefer "members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." Thus, he rested the entire justification for minority-sensitive admissions on the educational benefits to be achieved from an ethnically diverse student body. As Jack

Greenberg, Director-Counsel of the NAACP Legal Defense and Educational Fund sardonically notes, "the Powell opinion justifies consideration of race in admissions to benefit the larger, white community (!) although, incidentally, it also benefits blacks."

The short of it seems to be that race and ethnic background may be taken into account in university admissions decisions, along with other relevant factors, so long as the "program treats each applicant as an individual in the admissions process." With favorable citation of the present programs at Harvard and Princeton, which do just that, Justice Powell demonstrates that he has no intention of shutting down, or even reducing, current good faith efforts to bring increased numbers of minority group members into higher education.

Two kinds of diversity are involved in minority-sensitive admissions programs. (We can now reject those odious phrases "reverse discrimination" and "reverse bias.") One is the educational diversity to which Justice Powell refers in the above-quoted passages. A proper education objective is served by a diverse student body. As noted in the description of the Harvard College Admissions Program (quoted in the appendix to the Powell opinion):

> The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements.

Accordingly, again quoting:

> Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students,

> minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.
>
> * * * * *
>
> At the same time the Committee is aware that if Harvard College is to provide a truly heterogeneous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers.

The second kind of diversity promoted by increased minority representation applies particularly to the graduate and professional schools, which can better serve the public interest by training individuals from a wide variety of backgrounds, necessarily including racial and ethnic minorities. The Brennan group recognize the necessity of taking into account past societal discrimination in order to accomplish this result. Powell does not seem to agree, and the Stevens group is silent on this, as on most issues.

In any event, it is inconceivable that professional schools would willingly return to the time only ten or fifteen years ago when they were nearly all white (and nearly all male). If that disastrous reversion can be avoided only by taking race into account in the admissions decision, it behooves graduate and professional schools to take the necessary steps to do so.

That indeed has been the response of the higher education community, and that is what the Bakke case is principally about. Specifically, the case involved the admissions program at Davis, but fundamentally it was about minority-sensitive policies in higher education. While many of us defended the Davis program in order to protect the more general principle which it was intended to serve, many of those same supporters are willing to abandon that

program, which was by no means representative of special admissions programs because located instead at the extreme end of the spectrum.

Because the Davis program was so untypical, many members of the higher education community were distressed that it should serve as the test case. The fear was that the broad principle might be jeopardized when measured against an atypical system. In retrospect it may even have been useful to look at the problem from that almost distorted perspective. It became almost easy to reject the most extreme attempt to right the balance of past wrongs while preserving the principle of good faith efforts to accomplish the same result by less drastic means.

Significantly, few schools have adopted admissions programs comparable to the one at Davis. The mainstream of higher education should be able to continue without interruption despite the damming (and damning) of a small tributary.

The Bakke judgment and its 154 pages divided among six opinions will be criticized, as it has been already, for failing to provide crisp answers to all the questions that were or might have been put. But ambiguity has its uses. The Supreme Court of the United States is not equipped to act as the board of trustees for every college and university in the country. In this spirit I wish to suggest some of the strengths of the judgment and to identify some of the questions left for later resolution.

First. The most important proposition is that the Court has now resolved the terrible doubts that have long overhung all race-conscious admissions programs. No longer need admissions officers worry whether race may properly be

considered. Every college and university, once it has re-examined its program to ensure compliance with the Court's guidelines, will now be able openly to state what it intends. Justice Powell is surely right in saying that the majority-approved standard for application of race-conscious factors is not just a means of doing covertly what Davis did openly. There is a difference between the Davis two-track system and the single-track admissions programs favorably cited by Justice Powell. Justice Blackmun makes the same point. Although he (and I) would have found the Davis program valid, he agrees that minorities can prosper under the majority formulation. A program such as that at Harvard "where race or ethnic background is only one of the many factors, is a program better formulated than Davis' two-track system."

Second. The judgment is likely to meet general approval, a not inconsiderable virtue where the subject is as emotion-laden as this. Justice Powell quietly noted the Court's sensitivity to this question in footnote 53.

> There are also strong policy reasons that correspond to the constitutional distinction between petitioner's preference program and one that assures a measure of competition among all applicants. [The Davis] program will be viewed as inherently unfair by the public generally as well as by applicants for admission to state universities.

Opponents of minority-sensitive programs can stress the fact that Bakke is ordered admitted and that the Davis program, publicly identified under the pejorative term of "reverse discrimination," has been invalidated. Meanwhile, the universities and careful students of the opinions recognize, not only that they can live with the result, but that they have achieved essentially what they wanted.

In this connection it must be remembered that no member of the Court stated that race and ethnic background could not be taken into account. Five members of the Court specifically said that race is a relevant factor. Justice Stevens, writing for himself, Chief Justice Burger and Justices Stewart and Rehnquist, concluded, on the basis of a restrictive reading of the order of the California trial court, that the issue of a race-conscious admissions policy was not before the Court.

> It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate.

Based on that narrow reading of the record, Justice Stevens concluded that Bakke had been excluded from consideration for one aspect of the Davis admissions program because of his race and therefore in violation of Title VI of the Civil Rights Act of 1964. Reading Title VI to have a different and possibly more restrictive meaning than the equal protection clause of the fourteenth amendment, he therefore made no judgment on the constitutional question or even on the question whether a minority-sensitive admissions program different than the one at Davis would be valid.

The bottom line is that no member of the Court has denied the permissibility of taking race into account for some purposes. It seems to me unlikely that any member of the Court will subsequently adopt the extreme position that race and ethnicity can never be taken into account in the admissions process.

Third. If race may be taken into account to some extent, the remaining question is: How much? The strength of the present decision is that it leaves the preliminary shaping of answers to the education community. If there are individuals who wish to challenge programs that seek to comply with the Bakke message, we can hope the Court will be in no hurry to define rigidly the contours of what is permitted and what is forbidden.

In declining to prescribe admission standards for medical schools and thus by implication for other units of higher education, the Court has wisely invited the education community to devise "good faith" experiments to determine what best meets the needs of the education community and of the public interest at large. The new opportunity is to focus on means rather than ends. It may be hoped that the period of legal inquiry is largely past. The emphasis now should be on the education community to recover the almost-lost initiative in devising ways to bring increased numbers of minority group members into the programs of the selective institutions.

Each institution is invited to examine its own educational mission and to determine the educational impact of bringing - or failing to bring - minority groups into full partnership in that undertaking. But recall that no institution is required to do anything. The question now is whether institutions of higher education will indeed respond to the invitation - it is no more than that - to ensure the inclusion of minorities in the mainstream of higher education.

Important and difficult questions remain. It is the purpose of this seminar to ask how institutions of higher education should answer such questions as these:

First. In reviewing existing programs and devising modifications, to what extent can numbers be taken into account? Justice Powell brushed aside as a "semantic distinction" the asserted difference between quotas and goals. But neither he nor any other member of the Court denied that numerical objectives may be permissible - even inevitable. The "approved" Harvard program recognized that "the rich diversity of the United States . . . cannot be provided without some attention to numbers."

Second. What are permissible admissions criteria? If institutions of higher education are to reduce reliance on grade point averages and test scores, what other factors may be taken into account, and to what extent? Justice Powell, specifically recognizing that "race or ethnic background may be deemed a 'plus' in a particular applicant's file," noted that other qualities could be taken into account such as

> exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.

It is, I think, significant, that he twice cited favorably the work of Winton Manning, "The Pursuit of Fairness in Admissions to Higher Education," in Carnegie Council on Policy Studies in Higher Education, Selective Admissions in Higher Education (1977). In short, so-called "soft criteria" may - and should -

be taken into account. It is more difficult to base admissions decisions in part on subjective data. But that is now the challenge and the opportunity.

Third. What is the definition of a "minority" applicant? Recall, for instance, that the "Negro" petitioner in Plessy v. Ferguson (1896) was only one-sixth black. Why black, not white? How are we to classify those who bear Hispanic surnames only by the chance of marriage without linguistic heritage? For the time we may have to continue blunt determinations, but the issue cannot be indefinitely postponed.

Fourth. What is the impact on Bakke on financial aid and other special support programs intended to aid minority students in achieving their educational goals? The federal government has taken the lead in providing such benefits, but substantial questions remain.

The encouraging aspect of the reaction to Bakke is that the higher education community appears to be seeking ways to regain the initiative that was perhaps lost in recent years, to find the best ways to attract, admit and graduate persons from those groups in our pluralistic society who are seriously underrepresented in higher education today.

Important assistance is offered from diverse sources. The six regional seminars, of which this is one, offer an opportunity for the principal decision-makers to talk out the issues. The American Council on Education and the Association of American Law Schools have developed an excellent analysis. The American Bar Association, as well as other professional organizations, have urged renewed effort. Alternative models from present practice have

been reviewed by Messrs. Alexander Astin, Bruce Fuller, and Kenneth C. Green. The Ford Foundation, along with other not-for-profit organizations, has provided guidance and support.

The will is there; the way must be found. We are on the road to renewed discovery that the Constitution need not be color blind and that justice need not be blindfolded.